

A Watinah bt Mad Kartam v Dr KS Sarvananthar

B HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K22–189 OF
2008

B ABDUL RAHMAN SEBLI JC
4 SEPTEMBER 2009

C *Civil Procedure — Pleadings — Amendment — Effect of amendment —
Whether amendment may be allowed after striking out application filed*

D *Civil Procedure — Pleadings — Fraud — Whether issue of fraud may be raised
even if not pleaded*

E *Civil Procedure — Pleadings — Striking out statement of claim — Whether fit
and proper case for summary disposal under O 18 r 19(1) of the Rules of the High
Court 1980*

F The plaintiff was a patient of the defendant. In 1998, the defendant
performed a Lower Segment Caesarian Section ('LSCS') on the plaintiff.
G About three years later the plaintiff experienced abdominal pain and was
provisionally diagnosed with ovarian tumour. A laparotomy surgery was done
on her on 14 November 2007 and an abdominal pack was found in her
abdomen. It was this abdominal pack that had caused the pain. The plaintiff
H commenced this suit on 13 November 2008 claiming that the abdominal
pack had been left inside the plaintiff's abdomen during the LSCS performed
by the defendant on 1 July 1998 as the plaintiff did not have any other
surgery after the said LSCS. The defendant applied to strike out the plaintiff's
claim under O 18 r 19(1) of the Rules of the High Court 1980 ('RHC') on
the basis that the plaintiff's claim was statute barred. The defendant claimed
that the cause of action would have taken place on 19 August 1998, the date
the plaintiff had her post natal review at the defendant's clinic and was
reported to be well. The plaintiff sought to rely on s 18 of the Sabah
Limitation Ordinance 1953 ('the SLO') to argue that time only began to run
I after the plaintiff became aware of the defendant's fraudulent act of
concealing from her the fact that an abdominal pack had been left inside her
abdomen during the LSCS. Since the plaintiff had not pleaded s 18 of the
SLO, the plaintiff's applied to amend the pleadings to include the particulars
of fraud committed by the defendant.

Held, dismissing the defendant's application with costs:

- (1) An amendment of the pleadings should always be allowed provided: (a) there is bona fide on the part of the applicant; (b) they cause no prejudice to the other side which cannot be compensated with costs; and (c) they are not such as to turn a suit of one character into a suit of another and inconsistent character (see para 19).
- (2) Although the application for amendment was made after the striking out application was filed it did not bar the plaintiff from raising the issue of fraud (see para 20).
- (3) Having regard to the facts as disclosed in the pleadings and the affidavit evidence, this was not a fit and proper case for summary disposal under O 18 r 19(1) of the RHC (see para 21).

[Bahasa Malaysia summary]

Plaintif adalah pesakit defendan. Pada 1998, defendan telah melakukan satu pembedahan caesarian ('LSCS') ke atas plaintiff. Kira-kira tiga tahun kemudian plaintiff telah mengalami sakit di abdomen dan pada awalnya didiagnosis sebagai tumor ovari. Satu pembedahan laparotomi telah dilakukan ke atasnya pada 14 November 2007 dan satu pek abdomen telah ditemui dalam abdomennya. Pek abdomen tersebut yang telah menyebabkan kesakitan. Plaintiff telah memulakan guaman ini pada 13 November 2008 mendakwa bahawa pek abdomen telah ditinggalkan di dalam abdomen plaintiff semasa LSCS yang dilakukan oleh defendan pada 1 Julai 1998 memandangkan plaintiff tidak melakukan apa-apa pembedahan lain selepas LSCS tersebut. Defendan memohon untuk membatalkan tuntutan plaintiff di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa tuntutan plaintiff dihalang oleh statut. Defendan mendakwa bahawa kausa tindakan seharusnya bermula pada 19 Ogos 1998, tarikh plaintiff telah mendapat pemeriksaan semula selepas kelahiran di klinik defendan dan telah dilaporkan sihat. Plaintiff bergantung ke atas s 18 Ordinan Had Masa Sabah 1953 ('OHS') untuk menghujah bahawa masa hanya bermula selepas plaintiff sedar mengenai perbuatan penipuan oleh defendan yang menyembunyikan daripadanya fakta bahawa satu pek abdomen telah ditinggalkan di dalam abdomennya semasa LSCS. Oleh sebab plaintiff tidak memplid s 18 OHS, plaintiff memohon untuk meminda pliding bagi memasukkan butir-butir penipuan yang dilakukan oleh defendan.

Diputuskan, menolak permohonan defendan dengan kos:

- (1) Sesuatu pindaan kepada pliding harus sentiasa dibenarkan asalkan: (a) terdapat bona fide di pihak pemohon; (b) ia tidak menyebabkan

- A prejudis kepada pihak lain yang tidak boleh dipampas dengan kos; dan
(c) ia tidak menukar ciri-ciri suatu guaman kepada ciri-ciri suatu guaman yang lain dan tidak konsisten (lihat perenggan 19).
- (2) Walaupun permohonan untuk pindaan dibuat selepas permohonan pembatalan difailkan ia tidak menghalang plaintif daripada menimbulkan isu penipuan (lihat perenggan 20).
- B (3) Mengambil kira fakta-fakta seperti yang didedahkan dalam pliding dan keterangan afidavit, ini bukanlah satu kes yang sesuai untuk pelupusan terus di bawah A 18 k 19(1) KMT (lihat perenggan 21).]

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Notes

For cases on amendment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5196–5228.

For cases on fraud, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5415–5420.

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For cases on striking out statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5716–5767.

Cases referred to

- E *Applegate v Moss* [1971] 1 QB 406, CA (refd)
Lim Koon Ee v Mohd Saad [1962] MLJ 242, HC (refd)
Yong & Co v Wee Hood Teck Development Corp [1984] 2 MLJ 39, FC (refd)

Legislation referred to

- F Limitation Act 1939 [UK] s 26(b)
Rules of the High Court 1980 O 18 r 19(1), (2), (2)(a)
Sabah Limitation Ordinance (Cap 72) s 18, item 94A
Sarawak Limitation Ordinance (Cap 49) s 18
Rizwan Borhan (Rahim Abdullah & Co) for the plaintiff.
G *Eva Lo (Wong & Shim) for the defendant.*

Abdul Rahman Sebli JC:

- H [1] This is a medical negligence action. The plaintiff was a patient of the defendant. Sometime in 1995, the plaintiff had given birth to her fourth child at Kota Kinabalu Specialist Centre ('the KKSC') and the said birth and delivery was attended to by the defendant.
- I [2] In 1998, the plaintiff was having her fifth pregnancy. On 1 July 1998 she was in labour and was admitted to the KKSC where a lower segment caesarian section (the LSCS) was performed on her by the defendant. She was discharged on 4 July 1998. On 19 August 1998 she went to Klinik Sarva for post natal review and was attended to by the defendant.

- [3] About three years later the plaintiff began to experience episodes of abdominal pain and discomfort which was colicky in nature and with nausea. As time went by the plaintiff's pain became worse and occurred more frequently. Her abdomen was also growing in size. A
- [4] On 13 May 2007 the plaintiff went to Poliklinik Prisma where she was diagnosed with a 26 week size abdominal growth. She was then referred to the obstetrics and gynaecology clinic of Hospital Likas Kota Kinabalu. On 24 September 2007 she was provisionally diagnosed with a huge ovarian tumour and was admitted to Hospital Likas on 4 November 2007 with severe abdominal pain and nausea. An abdominal examination on the plaintiff revealed a 34 week sized foreign mass in her abdomen. B
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- [5] A laparotomy surgery was done on her on 14 November 2007. A foreign object in the form of an abdominal pack was found in her abdomen. It was this abdominal pack that had caused the plaintiff's pain and suffering throughout the years. On 19 November 2007 the plaintiff was discharged well from Hospital Likas. D
- [6] It is the plaintiff's pleaded case that the abdominal pack had been left inside the plaintiff's abdomen during the LSCS performed by the defendant on 1 July 1998 as the plaintiff she did not have any other surgery or operation after the said LSCS. She filed the present suit against the defendant on 13 November 2008. E
- [7] The defendant is applying to strike out the plaintiff's claim under O 18 r 19(1) of the Rules of the High Court 1980 ('the Rules'). The application is made under all four paragraphs of O 18 r 19(1) of the Rules but since O 18 r 19(2) prohibits the admission of evidence in an application under para (a), I shall disregard all affidavits filed by the defendant in so far as they relate to the application under that paragraph. F
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- [8] The principles applicable in an application of this nature is well settled and I do not propose to deal with them in this judgment save to say that whether a case is fit for striking out depends on the facts of each particular case as disclosed in the pleadings and the affidavit evidence. H
- [9] The only basis of the defendant's application is that the plaintiff's claim is statute barred. The question is when does the cause of action arise? The defendant says the cause of action would have taken place on 19 August 1998, the date the plaintiff had her post natal review at the defendant's clinic and was reported to be well and had no complaints. I

- A** [10] According to the defendant the limitation period expired on 19 August 2003 (para 10 of the defendant's affidavit in support). Learned counsel for the defendant in his written submission on the other hand submitted that the plaintiff's claim would be time barred by 2001.
- B** [11] Item 94A of the Sabah Limitation Ordinance (Cap 72) ('the SLO') prescribes a time limit of three years in an action for personal injury. This action according to the defendant is way out of time as it was only filed on 13 November 2008.
- C** [12] The plaintiff is relying on s 18 of the SLO to argue that time only began to run after the plaintiff became aware of the defendant's fraudulent act of concealing from her the fact that an abdominal pack had been left inside her abdomen during the LSCS done by the defendant on 1 July 1998.
- D** Section 18 of the SLO provides:
- When any person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limit for instituting a suit:
- E** (a) against the person guilty of the fraud or accessory thereto; or
- (b) against any person claiming through him otherwise than in good faith and for a valuable consideration,
- F** shall be computed from the time when the fraud first became known to the person injuriously affected thereby or, in the case of the concealed document, when he first had the means of producing it or compelling its production.
- G** [13] According to the plaintiff she could not have known about the defendant's negligent act within the limitation period of three years. It was only after her abdomen was cut open on 13 November 2007 at Hospital Likas (nine years after the LSCS was done) that the plaintiff discovered that a foreign object had been left inside her stomach. In para 7 of her affidavit in opposition this is what the plaintiff avers:
- H** I also aver that at no time during the post natal review did the defendant ever inform me that he had left behind or put an abdominal pack inside my abdomen. In fact, the defendant had informed me during the post natal review that was well and that there was nothing wrong with me. I fully believed the defendant as he was
- I** my doctor. The defendant is also a renowned gynaecologist in Kota Kinabalu.
- [14] Therefore according to the plaintiff time begins to run from 14 November 2007 and not earlier. In *Yong & Co v Wee Hood Teck Development Corp* [1984] 2 MLJ 39 the appellant was a firm of solicitors who

were sued for negligence and breach of contract for failing to charge the security in favour of the respondents. The appellants had charged the security to Hock Hua Bank on 4 July 1968 instead of to the respondents. The respondents only came to know about this on 30 November 1974. The trial court found in favour of the respondents and the decision was upheld on appeal to the Supreme Court. In dealing with s 18 of the Sarawak Limitation Ordinance which is in pari materia with s 18 of the SLO the Supreme Court said:

The limitation period under item 76 of the Schedule to the Ordinance is three years computed from the time when the fraud became known to the party wronged. We agree with the learned judge that the respondents discovered the fraud in 30 November 1974 ie within the three year limit from the time of discovery. The respondents were well within time and are therefore not barred by limitation.

[15] As to the meaning of 'fraud' in s 18 of the Sarawak Limitation Ordinance the court held:

In our view, fraud in this case is not limited to the common law fraud in which the action being one of deceit and it is necessary to prove actual fraud by showing that the false representation has been made knowingly or without belief in its truth or recklessly without caring whether it is true or false ... It extends to equitable or constructive fraud in which the concealment does not involve any dishonesty and no degree of moral turpitude is necessary to establish fraud within the section. The phrase covers conduct which having regard to some special relationship between the parties concerned, is an unconscionable thing for the one to do towards the other.

[16] In *Applegate v Moss* [1971] 1 QB 406 the facts are these. By contracts made in 1957, the defendant agreed to build two houses for the plaintiffs. The contracts provided that they should be built in accordance with the plans and specifications. The plaintiffs moved into the houses in 1957. In 1965, one of the plaintiffs wished to sell his house and experts for the intended purchasers discovered that the foundation of the house was so defective that the house was unsafe to live in. The plaintiffs brought an action outside the six year limitation period. The plaintiffs claimed that their rights of action were concealed by the fraud of the defendant or his agent within the meaning of s 26(b) of the English Limitation Act 1939 so that time did not begin to run until the date in 1965 when they discovered the fraud. The court held in favour of the plaintiffs.

- A [17] The defendant however argues that the plaintiff cannot rely on s 18 of the SLO as it is not pleaded. The plaintiff's answer is that she has filed an application for amendment of the pleadings to include the particulars of fraud committed by the defendant.
- B [18] In *Lim Koon Ee v Mohd Saad* [1962] MLJ 242 Suffian J (as he then was) even allowed an amendment of the statement of defence to include a counterclaim before delivery of judgment and after completion of the hearing.
- C [19] In any event it is trite law that an amendment of the pleadings should always be allowed provided:
- (a) there is bona fide on the part of the applicant;
- (b) they cause no prejudice to the other side which cannot be compensated with costs; and
- (c) they are not such as to turn a suit of one character into a suit of another and inconsistent character.
- E [20] Thus although the application for amendment was made after the striking out application was filed it does not bar the plaintiff from raising the issue of fraud. To accede to the defendant's argument would be to shut out the plaintiff's claim even before she could prove her case.
- F [21] Having regard to the facts as disclosed in the pleadings and the affidavit evidence I am of the view that this is not a fit and proper case for summary disposal under O 18 r 19(1) of the Rules.
- G [22] In the circumstances the application (encl 15) is dismissed with costs, to be taxed unless agreed.

Defendant's application dismissed with costs.

H Reported by Kanesh Sundrum

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